

FCC MAIL SECTION  
Before the  
Federal Communications Commission  
Washington, D.C. 20554

AUG 24 4 55 PM '94

MM Docket No. 92-11

In the Matter of

Amendment of Section 73.202(b),  
Table of Allotments,  
FM Broadcast Stations.  
(Inglis, Florida)

RM-7881

**MEMORANDUM OPINION AND ORDER  
(Proceeding Terminated)**

Adopted: August 12, 1994;

Released: August 24, 1994

By the Chief, Policy and Rules Division:

1. The Commission has before it the Petition for Reconsideration filed by Chapman S. Root Revocable Trust ("Root"), licensee of Station WEZY-FM, Channel 231C1, Lakeland, Florida.<sup>1</sup> Root requests reconsideration of our action allotting Channel 282A to Inglis, Florida.<sup>2</sup> William D. Elliott filed comments supporting Root's petition. Lucille Ann Lacy filed comments opposing the petition for reconsideration.

2. *Background.* At the request of Lucille Lacy, the *Notice of Proposed Rule Making*<sup>3</sup> in this proceeding proposed to allot Channel 282A to Inglis as that community's first local FM service. Both William Elliott and Lucille Lacy filed comments expressing continuing interest in the proposed allotment, and no oppositions were filed to this proposal. As a result, the *Report and Order* allotted Channel 282A to Inglis. Thereafter, a construction permit was granted to Lucille Lacy for a new FM station on Channel 282A at Inglis.<sup>4</sup>

3. *Petition for Reconsideration.* While Root did not participate earlier in this proceeding, it has filed this petition for reconsideration because it believes that the allotment of Channel 282A at Inglis would prevent the grant of its application to upgrade its Station WEZY-FM, Lakeland, Florida, from Channel 231C1 to Channel 231C. Specifi-

cally, Root explains that, in order to grant its application, Station WEZY-FM, Tampa, Florida, must switch from Channel 284C to Channel 283C.<sup>5</sup> Since the allotment of Channel 282A at Inglis conflicts with the substitution of Channel 283C at Tampa, Root requests that we now substitute Channel 242A at Inglis for Channel 282A to eliminate the conflict.

4. Root acknowledges that Channel 242A is the subject of a pending petition for allotment at the neighboring community of Yankeetown. However, Root contends that this is the only alternative channel that would not conflict with Channel 283C at Tampa. Root further argues that Channel 242A is not really needed at Yankeetown because (1) the Inglis and Yankeetown proposals are essentially identical in terms of both the area and population that would be served and (2) the populations of the two communities are very small.<sup>6</sup> As a result, Root requests that the allotment of Channel 282A at Inglis be deleted and that Channel 242A should be allotted to either Inglis or Yankeetown.

5. *Comments.* Elliott filed a comment in support of Root's proposal. In an opposition, Lacy contends that Root's petition for reconsideration is procedurally defective and should therefore be dismissed. Specifically, Lacy contends that Root has not complied with the requirements of Section 1.429 of the Commission's Rules because it has submitted impermissible new matter.<sup>7</sup> Since Root did not participate earlier in this proceeding, Lacy contends that it should be barred from doing so now.

6. Lacy further argues that Root's petition openly states that the reason for its filing is personal self interest, not the public interest. Lastly, Lacy contends that Root's assertions regarding its proposal for Lakeland, Florida, are speculative and without merit as they relate to this proceeding. Indeed, Lacy states that Root's proposed substitution of channels at Tampa was specifically rejected in another FM allotment proceeding, MM Docket 88-512.

7. *Discussion.* After careful consideration of the pleadings filed in this proceeding, we find that Root's petition for reconsideration should be denied. As previously noted, Section 1.429 governs the filing and consideration of petitions for reconsideration in notice and comment rulemaking proceedings. Section 1.429 permits grant of a reconsideration request based on facts not previously presented to the Commission under certain conditions. However, we find that the new matter that Root has introduced does not fit into these conditions.

8. Specifically, Root is now contending for the first time in this proceeding that the allotment of Channel 282A at Inglis would conflict with the substitution of Channel 283C

<sup>1</sup> Public Notice of the petition was given on August 12, 1992, Report No. 902.

<sup>2</sup> *Report and Order*, 7 FCC Rcd 3446 (1992).

<sup>3</sup> 7 FCC Rcd 884 (1992).

<sup>4</sup> File No. BPH-920820MD. An application was subsequently granted on November 11, 1993, consenting to the assignment of the construction permit from Lucille Lacy to West Coast Radio Corporation.

<sup>5</sup> This channel switch would prevent a short-spacing under Section 73.207(b)(1), Table A, of the Commission's Rules which requires Class C FM stations on channels 10.6 MHz apart (i.e., 53 channels removed from each other) to be separated by 48 kilometers (30 miles) to prevent intermediate-frequency (IF) intermodulation interference. See *Edens Broadcasting, Inc.*, 5 FCC Rcd 2576, 2578 n.1 (1990) for a brief explanation of IF

interference.

<sup>6</sup> Root states that the 1990 populations of Inglis and Yankeetown were 1,241 and 602, respectively.

<sup>7</sup> Section 1.429 of the rules provides that a petition for reconsideration which relies on facts which have not previously been presented to the Commission will be granted only under the following circumstances: (1) the facts relied on relate to events which have changed since the last opportunity to present them to the Commission; (2) the facts relied on were unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity; or (3) the Commission determines that consideration of the facts relied on is required in the public interest.

at Tampa. It also alleges that it "conducted a channel search for Inglis to find an alternative channel that would not conflict with Channel 283C at Tampa" and that the use of Channel 242A at Inglis would resolve this conflict. However, we do not believe that these are events that have changed since the last opportunity to present them to the Commission or are facts that could not have been learned of by the petitioner through the exercise of ordinary diligence until after its last opportunity to present them to the Commission, within the meaning of Section 1.429 of the Rules. On the contrary, since we allotted the same channel that we had originally proposed in the *Notice of Proposed Rulemaking* in this proceeding, Root could have discovered the conflict between the Inglis and Tampa channels and participated earlier in this proceeding. Indeed, we note that Root had filed this same proposal in MM Docket 88-512, which was dismissed for reasons of a short-spacing to an Atlantic Beach, Florida station.<sup>8</sup> Likewise, by exercising ordinary diligence, it could have discovered the availability of Channel 242A and brought its concerns to our attention in both the instant proceeding, as well as in MM Docket No. 92-60. However, it did not participate in either proceeding, and Channel 242A was allotted to Yankeetown, Florida, in MM Docket No. 92-60, making it unavailable as an alternative channel in the instant proceeding.<sup>9</sup> Under these circumstances, the new matter presented by Root cannot be considered at this time and should have been filed before the counterproposal deadline in this proceeding pursuant to Section 1.420(d) of the Commission's Rules.

9. Beyond the above described deficiencies with Root's petition for reconsideration, we note that changed circumstances have mooted the basis for the relief requested by Root. Specifically, there is no longer a need for Root to substitute Channel 283C for Channel 284C at Station WRBQ(FM), Tampa, Florida, because that station was subsequently downgraded from Channel 284C to Channel 284C1 as a result of the Commission's dismissal of its application to retain Class C status. See *Edens Broadcasting, Inc.*, 5 FCC Rcd 2576 (1990), *aff'd sub nom. Edens Broadcasting, Inc. v. FCC*, No. 91-1387 (D.C. Cir. June 17, 1992). See also *Public Notice on Reclassification of FM Facilities Pursuant to BC Docket 80-90*, 2 FCC Rcd 2124 (1987).<sup>10</sup> Furthermore, Root's Station WEZY-FM, Channel 231C1, Lakeland, Florida, was granted a construction permit to upgrade to Channel 231C.<sup>11</sup>

10. Accordingly, IT IS ORDERED. That the petition for reconsideration filed by Chapman S. Root Revocable Trust IS DISMISSED.

11. IT IS FURTHER ORDERED. That this proceeding is terminated.

12. For further information concerning this proceeding, contact Arthur D. Scrutchins, Mass Media Bureau., (202) 634-6530.

## FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink  
Chief, Policy and Rules Division  
Mass Media Bureau

<sup>8</sup> See *Bonita Springs*, 6 FCC Rcd 6966 (1991).

<sup>9</sup> See *Yankeetown, FL*, 8 FCC Rcd 4274 (1993).

<sup>10</sup> As a result of Station WRBQ-FM being downgraded to

Channel 284C1, the required spacing between Station WRBQ and WEZY(FM), Lakeland, is reduced from 48 to 41 kilometers.

<sup>11</sup> File No. BMPH-930914IF.